

No. 34854-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONNY JAMES ST. PETER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Christopher E. Culp

BRIEF OF APPELLANT

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A. INTRODUCTION

“Our state constitution requires that in a criminal prosecution an impartial jury render a unanimous verdict.” *State v. Lamar*, 180 Wn. 2d 576, 583, 327 P.3d 46 (2014). The trial court instructed the jury that “[a]s jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict” and “[b]ecause this is a criminal case, each of you must agree for you to return a verdict.” The jury instruction failed to require a unanimous verdict because it did not instruct the jury to deliberate only when all twelve jurors are assembled together in the jury room.

Although defense counsel did not object to the jury instructions, a jury instruction which fails to require a unanimous verdict constitutes a manifest error affecting a constitutional right that may be raised for the first time on appeal under RAP 2.5(a)(3). Moreover, the failure to require a unanimous verdict is a structural error presumed to be prejudicial and therefore not subject to harmless error analysis.

Accordingly, Donny St. Peter’s convictions must be reversed where the jury instruction failed to require the jury to deliberate only when all twelve jurors are assembled together in the jury room which violated his constitutional right to a unanimous jury verdict.

B. ASSIGNMENT OF ERROR

The trial court failed to instruct the jury to deliberate only when all twelve jurors are together and assembled in the jury room in violation of St. Peter's constitutional right to a unanimous verdict.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is reversal required because St. Peter was denied his constitutional right to a unanimous verdict where the trial court failed to instruct the jury that it must deliberate only when all twelve jurors are assembled together in the jury room?

D. STATEMENT OF THE CASE

1. Procedure

On March 7, 2016, the State charged appellant, Donny James St. Peter, with two counts of burglary in the second degree, theft in the third degree, and attempted theft in the third degree under cause number 16-1-00093-1. CP 215-17. On March 10, 2016, the State charged St. Peter with two counts of burglary in the second degree and two counts of theft in the third degree under cause number 16-1-00100-7. Supp. CP ____ (Sub # 4, Information, 03/10/16). The cases were consolidated for trial. RP 6.

Following a trial before the Honorable Christopher E. Culp, a jury found St. Peter guilty as charged on October 14, 2017. RP 137-38. On October 18, 2017, the court sentenced St. Peter to 60 months in

confinement, imposed legal financial obligations, and ordered restitution. RP 152-61; CP 29-39.

St. Peter filed a timely notice of appeal. CP 6-17. Supp. CP ____ (Sub #69.1, Notice of Appeal, 11/14/16).

2. Facts

Matthew Monnin works at Walmart in Omak as an asset protection associate. RP 38. After receiving notice of a potential theft occurring on November 24, 2015, Monnin reviewed the store video of that day. On the video, he saw a man, later identified as St. Peter, walk out of the store with beer which he did not purchase. RP 52-53. On November 25, 2015, Monnin recognized St. Peter in the store. He followed St. Peter who appeared to be concealing merchandise. He could not see the merchandise so he went to review the store video, but in the meantime, St. Peter left. RP 54-56.

On March 3, 2016, Monnin saw St. Peter in the store taking merchandise which he did not purchase. RP 44-47. When St. Peter went into the restroom, Monnin called the police. 48-49. Omak police officers arrived and apprehended St. Peter in the restroom where he was removing packaging from a pack of socks. RP 32-35.

Monnin identified Walmart videos for November 24, 2015, November 25, 2015, and March 3, 2016, which showed St. Peter taking unpurchased beer and merchandise from the store. RP 60-73; Exs. 1, 2, 3. Walmart had previously served St. Peter with a notification which restricted him from the property. RP 41-43.

After presentation of the evidence and before closing argument, the court read the instructions to the jury. RP 99-113.

E. ARGUMENT

REVERSAL IS REQUIRED BECAUSE ST. PETER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT IT MUST DELIBERATE ONLY WHEN ALL TWELVE JURORS ARE ASSEMBLED TOGETHER IN THE JURY ROOM.

Under our state constitution, criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, sections 21 and 22¹; *State v.*

¹ Wash. Const. art. I, sect. 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art I, sect. 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process

Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994), *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

Our state approach “is in accord with the American experience of jury unanimity.” *State v. Lamar*, 180 Wn.2d 576, 584, 327 P.3d 46 (2014).

Our Supreme Court concurred with an often-cited passage from the California State Supreme Court:

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member’s viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.

Lamar, 180 Wn.2d at 585 quoting *People v. Collins*, 17 Cal.3d 687, 693, 552 P.2d 742, 131 Cal.Rptr. 782 (1976).

This Court also cited *People v. Collins*, in establishing that, “One of the essential elements of the right to trial by jury is that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous. Those 12 jurors must reach their consensus through deliberations which are the common experience of *all* of them.” *State v. Fisch*, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979)(emphasis added).

to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

To ensure that deliberations do not occur outside the presence of the whole jury, jurors in *Bormann v. Chevron USA, Inc.* were instructed that during separation, they “must not discuss with anyone any subject connected with this trial,” and “must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.” 56 Cal. App. 4th 260, 262-63, 65 Cal. Rptr. 2d 321, 323 (1997).

Here, the trial court gave the following jury instructions:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 46 (Instruction No. 2).

When you begin deliberating, you should first select a presiding juror. The presiding juror’s duty is to see that you discuss the issues in this case in a orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

....

Because this a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 72-73 (Instruction No. 28).

The court's instructions failed to require a unanimous verdict because the jurors were not instructed that they must deliberate only when all twelve of them are assembled together in the jury room. As our Supreme Court observed, "It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11." *Lamar*, 180 Wn.2d at 585 quoting the California Supreme Court in *Collins*, 17 Cal.3d at 693. The California Supreme Court emphasized further "that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity." *Collins*, 17 Cal.3d at 693. It is certainly conceivable that a juror could have left the jury room for some reason and returned while the others continued to deliberate. Without a jury instruction which explicitly instructs the jurors to deliberate only when all twelve of them are together in the jury room, the constitutional requirement of a unanimous verdict is not met.

Although defense counsel did not object to the jury instructions, a jury instruction which fails to require a unanimous verdict constitutes a manifest error affecting a constitutional right that may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. O'Hara*, 167 Wn.2d 91, 100-

01, 217 P.3d 756 (2009)(jury instruction which fails to require a unanimous verdict is manifest constitutional error).

Moreover, the failure to require a unanimous verdict is a structural error presumed to be prejudicial and therefore not subject to harmless error analysis. Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Where there is structural error, “ ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’ ” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)(citation omitted)). Structural error is not subject to harmless error analysis. *Id.* at 309-10; *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

In *State v. Wise*, 176 Wn.2d 1, 13, 288 P.3d 1113 (2012), our Supreme Court concluded that violation of the constitutional right to a public trial constitutes structural error. In *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013), this Court concluded that a defective reasonable doubt instruction is structural error. A violation of the right to a public trial and a violation of the right to proof beyond a reasonable doubt

are structural errors where prejudice is presumed because it is often difficult to assess the effect of the error. *Wise*, 176 Wn.2d at 17; *Smith*, 174 Wn. App. at 368-69.

Similarly, a jury instruction that fails to instruct the jurors to deliberate only when all twelve jurors are assembled together in the jury room, in violation of the constitutional right to a unanimous verdict, constitutes structural error because the lack of such an instruction affects the framework within which the jury deliberates to reach a unanimous verdict. Further, it is difficult to assess the effect of the error because there is no way of knowing whether all twelve jurors were present at all times during deliberations.

“In a criminal case, we must be certain that the verdict is unanimous.” *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). There is no certainty when the jury instruction fails to require a unanimous verdict, especially in this case where the jury was not polled. RP 137-38. Consequently, St. Peter was denied his constitutional right to a unanimous verdict which requires reversal.

F. CONCLUSION

“In a criminal trial, a jury verdict finding a defendant guilty of committing a crime must be unanimous.” *Lamar*, 180 Wn.2d at 589.

For the reasons stated, this Court should reverse Mr. St. Peter's convictions.

DATED this 23rd day of June, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Okanogan County Prosecutor's Office at sfield@co.okanogan.wa.us and bplatter@co.okanogan.wa.us per agreement between the parties and by U.S. Mail to Donny James St. Peter, DOC # 394526, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of June, 2017

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